

SEPA Rule Making Round 1: Revised Draft proposed WAC 197-11 revisions

The following draft revisions to the State Environmental Policy Act (SEPA) administrative rules in Washington Administrative Code (WAC) 197-11 are based on comments to the 9/25/12 and 10/2/12 drafts. New changes are shown in blue.

Comments on this draft need to be provided by 2:00 pm October 9, 2012 to separulemaking@ecy.wa.gov. If you have questions, please call Fran Sant at (360) 407-6932 or send inquiries to the email address above. We greatly appreciate your assistance.

WAC 197-11-800

(1) Minor new construction -- Flexible thresholds.

(a) The exemptions in this subsection apply to all licenses required to undertake the construction in question, except when a rezone or any license governing emissions to the air or discharges to water is required. To be exempt under this subsection, the project must be equal to or smaller than the exempt level. For a specific proposal, the exempt level in (b) of this subsection shall control, unless the city/county in which the project is located establishes an exempt level under (c) of this subsection. If the proposal is located in more than one city/county, the lower of the agencies' adopted levels shall control, regardless of which agency is the lead agency.

(b) The following types of construction shall be exempt, except when undertaken wholly or partly on lands covered by water:

(i) The construction or location of ~~any four detached single family residential structures-units of four dwelling units.~~

(ii) The construction or location of ~~four multi-family residential structure(s)-units, containing 4 dwelling units (including duplexes and other multi-unit structures).~~

~~(iii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 10,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots or processing facilities.~~

~~(iv) The construction of an office, school, commercial, recreational, service or storage building with 4,000 square feet of gross floor area, and with associated parking facilities designed for twenty automobiles. This exemption includes stand-alone parking lots except in residential zones.~~

~~(iv) The construction of a parking lot designed for twenty automobiles.~~

(v) Any ~~stand-alone~~ landfill or excavation of 100 cubic yards throughout the total lifetime of the fill or excavation ~~not including fill or excavation under an exempt building listed above associated with an exempt~~

Comment [GS1]: The DOE 10/8/12 Draft ("Draft") can be read to allow an unlimited number of multi-family buildings each with four units. Some local codes define multi-family as not including duplexes so you could keep the words "including duplexes" but I think it is clear without those words. Alternatively, you can define multi-family in WAC 197-11-700. As modified herein, subsection (ii) mirrors the Draft language in subsection (i).

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Comment [GS2]: Processing plants have major impacts and should not be exempt.

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Comment [GS3]: Parking lots can have major impacts in residential zones.

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Comment [GS4]: First, the proposed language confirms current practice that grading permits are not required for excavations and fills under any building. The Draft as written allows an exception for unlimited grading (over a million cu. yds.) if the applicant proposes a 10' by 10' construction office to oversee the grading. The office is exempt under subsection (iv) and the Draft then makes the grading exempt. This exemption allows major impacts without SEPA review and is contrary to law.

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~~project listed above~~; and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder.

(c) ~~Optional higher thresholds.~~

~~—(i) Tier 1 optional higher thresholds:~~ Cities, towns or counties may raise the exempt levels ~~up to the Tier 1~~ maximum specified ~~in Table 1~~ below by implementing ordinance or resolution. Such levels shall be specified in the agency's SEPA procedures (WAC 197-11-904) ~~and sent to the department of ecology. A newly established exempt level shall be supported by local conditions, including zoning or other land use plans or regulations.~~ An agency may adopt a system of several exempt levels (such as different levels for different geographic areas.)

~~At a minimum, the following process shall be met in order to raise the exempt levels establish a new flexible exemption level.~~

i. ~~Documentation that the requirements for environmental analysis, protection and mitigation for impacts to elements of the environment (listed in WAC 197-11-444) have been adequately addressed so that the exempt levels do not allow project types which are major actions significantly affecting the quality of the environment. These can be addressed in specific adopted development regulations, comprehensive plans that are made regulatory by law or regulation, and applicable state and federal regulations.~~

ii. ~~Description of the project-level public comment opportunities that are otherwise provided for proposals included in these increased exemption levels.~~

iii. ~~The ordinance or resolution containing the proposed new exemption levels and associated documentation is subject to a 21-day comment period that includes public notice and agency distribution to the Department of Ecology, affected Tribes, agencies with expertise and affected jurisdictions.~~

~~An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt levels for the exemptions in (1)(b) of this section are identified on Table 1. Separate maximum optional thresholds are established in Table 1 applying to UGA and Non-UGA incorporated areas and unincorporated Urban Growth Areas; and for other unincorporated areas.~~

The maximum exempt levels for the exemptions in (1)(b) of this section ~~are identified on Table 1. shall be, respectively:~~

- ~~—(i) 20 dwelling units.~~
- ~~—(ii) 30,000 square feet.~~
- ~~—(iii) 12,000 square feet; 40 automobiles.~~
- ~~—(iv) 40 automobiles.~~
- ~~—(v) 500 cubic yards.~~

~~—(iii) Tier 2 optional thresholds: In addition to the provisions of subsection (i) above, a newly established Tier 2 exemption level shall be supported by findings that the requirements for environmental analysis, protection, and mitigation for the exempted types of development have been adequately addressed in development regulations and comprehensive plans adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules. The city, town or county shall explain how these existing requirements adequately avoid, minimize or otherwise compensate for probable significant impacts with analysis and findings relevant to~~

Comment [GS5]: Draft language suggests that the only option is adopt the maximum levels in Table 1 when intent is to allow any new exempt level up to those in Table 1 to be adopted.

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Comment [GS6]: Strictly speaking, a raised exempt level is not "flexible." This proposed revision uses language from the first sentence of subsection (c) in the Draft.

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Comment [GS7]: There is no requirement for analysis and protection for new exempt levels and the Draft does not create any such clear requirement. This rule is illegal if it does not prevent types of actions that significantly affect the quality of the environment. Without the proposed language or similar language the rule is contrary to law.

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Comment [GS8]: Comprehensive plans must be implemented by law or regulation. RCW 36.70A.040. Plans only serve to guide regulations and unless a law or regulation implements the plan, the plan has no regulatory effect.

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Comment [GS9]: Table 1, as proposed, only needs two columns – the first column can be labeled UGA and the second column can be labeled Non-UGA and the third column can be eliminated. If numbers in the second and third columns do not remain the same, three columns will be necessary.

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each element of the environment. Separate maximum optional thresholds are established in Table 1 for incorporated areas and unincorporated Urban Growth Areas; and for other unincorporated areas.

— (iii) Table 1 – Optional Tier 1 and Tier 2 thresholds:

Levels	Tier 1 upper thresholds	Tier 2 upper thresholds: City and unincorporated UGA	Tier 2 upper thresholds: Unincorporated areas not included in UGA
(i) Single family residential [number of units]	20	40	25
(ii) Multifamily residential [number of units]	20	80	25
(iii) Agricultural [square feet]	30,000	40,000	60,000
(iv) Office, school, commercial + parking [square feet and number of spots]	12,000 + 40	40,000 + 120	12,000 + 40
(vi) Landfill or excavation [cubic yards]	500	1,000	1,000

— (iv) Notice for projects exempted under subsection (ii): The agency shall ensure that notice is provided for projects exempted under Tier 2 optional thresholds in subsection (iii). Notice shall include submittal of a brief summary of the proposal for publication on the SEPA register as provided in WAC 197-11-508.

Table 1

	Fully Planning GMA Counties		All other counties
Levels	Incorporated and unincorporated UGA	Other unincorporated areas	Incorporated and unincorporated areas
Single family residential [# of units] *	30	20	20
Multifamily residential [# of unit] *	60	25	25
Agricultural [sq ft]	40,000	40,000	40,000
Office, school, commercial + parking [sq ft + # of spots]	30,000 + 90 20,000 + 60	12,000 + 40	12,000 + 40
Landfill or excavation [cu yds]	1000	1000	1000

* Not including new subdivision

Comment [GS10]: Per comment GS9 about, Table 1, as proposed, can be expressed with only two columns.

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Comment [GS11]: As described in the Environmental Caucus 10-9-12 comment letter the diversity of uses and locations allowed by this DOE proposed exemption is likely to permit major actions significantly affecting the quality of the environment and therefore be in violation of RCW 43.21C.110. The maximum exempt level should be no greater than 20,000 sf + 60.

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WAC 197-11-508 SEPA Register

(1) The department of ecology shall prepare a SEPA register at least weekly, giving notice of all environmental documents required to be sent to the department of ecology under these rules, specifically:

- (a) DNSs under WAC 197-11-340(2);
- (b) DSs (scoping notices) under WAC 197-11-408;
- (c) EISs under WAC 197-11-455, 197-11-460, 197-11-620, and 197-11-630;
- (d) Notices of action under RCW 43.21C.080 and 43.21C.087; and
- (e) Notices in the optional DNS process under WAC 197-11-355 (2)(d)(i) and (5).

~~(f) Notice of projects exempted from SEPA review as provided in WAC 197-11-800(c)(iv).~~

(2) All agencies shall submit the environmental documents listed in subsection (1) of this section to the department promptly and in accordance with procedures established by the department.

(3) Agencies are encouraged to refer to the SEPA register for notice of SEPA documents which may affect them.

(4) The department:

(a) Shall establish the method for distributing the SEPA register, which may include listing on internet, publishing and mailing to interested persons, or any other method deemed appropriate by the department.

(b) May establish a reasonable format for the SEPA register;

(c) May charge a reasonable fee for the SEPA register as allowed by law, in at least the amount allowed by chapter 42.17 RCW, from agencies, members of the public, and interested organizations.

(5) Members of the public, citizen and community groups, and educational institutions are encouraged to refer to the SEPA register for notice of SEPA actions which may affect them.

Comment [GS12]: If there continues to be no change to this section, WAC 197-11-508 need not be included in the Final Proposal.

WAC 197-11-800(23) (excerpt of amended section)

(23) **Utilities.** The utility-related actions listed below shall be exempt, except for installation, construction, or alteration on lands covered by water. The exemption includes installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class. . . .

(c) All electric distribution facilities, lines, equipment or appurtenances, not including distribution substations, installed within existing improved rights-of-way and developed utility corridors, with an associated voltage of 55,000 ~~115,000~~ volts or less; and the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (~~more than 55,000 volts~~ up to and including 115,000 (volts); electric transmission facilities, lines, equipment or appurtenances, not including transmission substations up to and including 115,000 volts) installed within the demonstrated vertical and horizontal limits of previous construction in

Comment [GS13]: I assume that the failure to change "more than 55,000 volts" to "up to and including 115,000 volts" was a clerical error that will be corrected. The bottom line of the discussions with the utilities subcommittee and the 9-25-12 draft is that this exemption will be limited to 115,000 volts. Going above 115,000 volts would be an illegal major impact to the environment.

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existing improved rights-of-way and developed utility corridors; and the undergrounding of all electric facilities, lines, equipment or appurtenances.

197-11-315 Environmental checklist.

(1) Agencies shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for:

- (a) Public proposals on which the lead agency has decided to prepare its own EIS; or
- (b) Proposals on which the lead agency and applicant agree an EIS will be prepared; or
- (c) Projects which are proposed as planned actions (see subsection (2) of this section) ; or

(d) Projects where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan, or other existing legal authorities (see subsection (6) of this section); or.

(e) Nonproject proposals where the lead agency determines that questions in Part B do not provide contribute meaningfully to the analysis of the proposal. In such cases, part A, C and D at a minimum shall be completed.

(2) For projects submitted as planned actions under WAC 197-11-164, a GMA county/city shall use the existing environmental checklist or modify the environmental checklist form to fulfill the purposes outlined in WAC 197-11-172(1), notwithstanding the requirements of WAC 197-11-906(4).

If the GMA county/city chooses to modify the existing environmental checklist, the modified form shall be submitted to the department of ecology to allow at least a thirty-day review prior to use. The department shall notify the GMA county/city within thirty days of receipt if it has any objections to the modified form and the general nature of the objections. If the department objects, the modified form shall not be used until the GMA county/city and the department have reached agreement.

(3) Agencies may use an environmental checklist whenever it would assist in their planning and decision making, but shall only require an applicant to prepare a checklist under SEPA if a checklist is required by subsection (1) of this section.

(4) The lead agency shall prepare the checklist or require an applicant to prepare the checklist.

(5) The items in the environmental checklist are not weighted. The mention of one or many adverse environmental impacts does not necessarily mean that the impacts are significant. Conversely, a probable significant adverse impact on the environment may result in the need for an EIS.

(6) The lead agency for an environmental review under this chapter may identify within the checklist provided to applicants instances where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan **made regulatory by a development regulation**, or other legal authority. A lead agency still must consider whether the action has an impact on the particular element or elements of the environment in question.

(a) In instances where the locally adopted ordinance, development regulation, land use plan **made regulatory by a development regulation**, or other legal authority provide the necessary information to answer a specific question, the lead agency must explain how the proposed project satisfies the underlying local legal authority.

Comment [GS14]: As stated in comment GS8 hereto, land use plans must be implemented by development regulations to have regulatory effect. Plans only serve to guide regulations and unless a regulation implements the plan, the plan has no regulatory effect. Because ordinances and development regulations are the only local regulatory authority, the inclusion of "land use plan" in the Draft is in error and could be eliminated or changed as herein proposed.

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Comment [GS15]: See comment GS13 herein.

(b) If the lead agency identifies instances where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan, **made regulatory by a development regulation**, or other legal authority, an applicant may still provide answers to any questions on the checklist.

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Comment [GS16]: See comment GS13 herein.

(c) Nothing in this section authorizes a lead agency to ignore or delete a question on the checklist.

(7) The lead agency may determine the appropriate methods for receipt of electronic submittals of the checklist from applicants including electronic signature of part C of the checklist.

(8) Lead agencies may include helpful information (including web links) in the checklist to assist applicants in completing the questions.

197-11-906 Content and consistency of agency procedures.

(1)(a) Agency SEPA policies and procedures shall implement and be consistent with the rules in this chapter. Unless optional or permissive (see WAC [197-11-704](#)), all of the provisions of this chapter are mandatory, and agency procedures shall incorporate these rules and criteria.

(b) Permissive and optional rules shall *not* be construed as mandatory requirements. Rules giving encouragement or guidance shall also not be construed as mandatory. The decision on whether to apply an optional provision rests with the responsible official.

(c) Except as stated in the next subsection, the rules in this chapter are not exclusive, and agencies may add procedures and criteria. However, any additional material shall not be inconsistent with, contradict, or make compliance with any provision of these rules a practical impossibility. Any additional material shall be consistent with SEPA.

(d) Agency procedures shall also include the procedures required by sections WAC [197-11-055](#) (3)(a) and (4), 197-11-420 (1) and (4), and 197-11-910.

(e) Agency procedures may include procedures under WAC [197-11-055](#) (2) and (7), 197-11-100(3), 197-11-680, 197-11-714(2), 197-11-800(1), and 197-11-908. Any such procedures shall include the content required by those rules.

(2) The following provisions of this chapter are exclusive and may not be added to or changed in agency procedures:

(a) The definitions of "proposal," "major," "action," "significant," "affecting," "environment," "categorical exemption," "agencies with jurisdiction," "lands covered by water," "built environment," "natural environment," "license," "licensing," "mitigation," and "scope";

(b) The criteria for lead agency determination (Part Ten of these rules);

(c) The categorical exemptions in Part Nine of these rules, unless expressly allowed under Part Nine;

(d) The information allowed to be required of applicants under WAC [197-11-080](#), [197-11-100](#), [197-11-335](#), and [197-11-420](#);

(e) The requirements for the style and size of an EIS (WAC [197-11-425](#));

(f) The list of elements of the environment (WAC [197-11-444](#)); and

(g) The provisions on substantive authority and mitigation in WAC [197-11-660](#).

(3) The following provisions of this chapter may not be changed, but may be added to; any additions shall meet the criteria for additional material stated in subsection (1)(c) of this section:

(a) All other definitions in Part Eight of these rules;

(b) The provisions in Parts Four and Five of these rules, except as necessary to be grammatically incorporated into agency procedures;

(c) The contents of agency SEPA procedures (WAC [197-11-906](#)); and

(d) The list of agencies with environmental expertise (WAC [197-11-920](#)).

(4) The forms in Part Eleven shall be used substantially as set forth. Minor changes are allowed to make the forms more useful to agencies, applicants, and the public, as long as the changes do not eliminate requested information or impose burdens on applicants. ~~The questions in Part Two of the environmental checklist shall not be altered.~~

197-11-960 Environmental checklist (excerpt of section proposed for revision)

Purpose of checklist.

The State Environmental Policy Act (SEPA), chapter [43.21C](#) RCW, requires all governmental agencies to consider the environmental impacts of a proposal before making decisions. An environmental impact statement (EIS) must be prepared for all proposals with probable significant adverse impacts on the quality of the environment. The purpose of this checklist is to provide information to help you and the agency identify impacts from your proposal (and to reduce or avoid impacts from the proposal, if it can be done) and to help the agency decide whether an EIS is required.

Instructions for applicants:

This environmental checklist asks you to describe some basic information about your proposal. Governmental agencies use this checklist to determine whether the environmental impacts of your proposal are significant, requiring preparation of an EIS. Answer the questions briefly, with the most precise information known, or give the best description you can.

You must answer each question accurately and carefully, to the best of your knowledge. In most cases, you should be able to answer the questions from your own observations or project plans without the need to hire experts. If you really do not know the answer, or if a question does not apply to your proposal, write "do not know" or "does not apply." Complete answers to the questions now may avoid unnecessary delays later.

Some questions ask about governmental regulations, such as zoning, shoreline, and landmark designations. Answer these questions if you can. If you have problems, the governmental agencies can assist you.

The checklist questions apply to all parts of your proposal, even if you plan to do them over a period of time

or on different parcels of land. Attach any additional information that will help describe your proposal or its environmental effects. The agency to which you submit this checklist may ask you to explain your answers or provide additional information reasonably related to determining if there may be significant adverse impact.

Use of checklist for nonproject proposals:

Complete this checklist for nonproject proposals, including the supplemental sheet for non project actions (part D). When the questions for the environmental elements (part B) do not contribute meaningfully to the analysis of the proposal, they may be excluded by the lead agency. even though questions may be answered "does not apply." ~~IN-ADDITION, complete the SUPPLEMENTAL SHEET FOR NONPROJECT ACTIONS (part D).~~

~~Complete the SUPPLEMENTAL SHEET FOR NONPROJECT ACTIONS (part D).~~

For nonproject actions, the references in the checklist to the words "project," "applicant," and "property or site" should be read as "proposal," "proposer," and "affected geographic area," respectively.